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Case,¹³ in which an injunction to stay waste was granted on behalf of a child *en ventre sa mère*. In the desire of a court of equity, however, to restrain the unconscionable use of a legal power,¹⁴ the consideration of whether anyone existed in whose favor the right might be exercised may well have been disregarded. The analogies of the criminal law have been urged in support of the infant's claim for damages. Injuries to a child while in the womb of its mother which result in its death after having been born alive may support an indictment for manslaughter or murder.¹⁵ This is correct on any theory. The defendant's act has caused the death of a human being; it is then homicide, regardless of whether or not the victim was in being at the time the act was done. On the other hand the holdings that no injuries to a child *en ventre sa mère* can be homicide unless the child is born alive¹⁶ are conclusive against the contention that the criminal law recognizes the unborn child as a person.

Judicial decision has thus consistently adopted the ordinary conception that a person's existence dates from his birth. It follows that he cannot recover for prenatal injuries although they caused his birth in a deformed condition. For there has been no injury to him as an independent entity, since his condition as a result of the defendant's act is at no time worse than at any previous point in his existence.¹⁷ Such has been the result reached by all the decided cases.¹⁸

PRICE RESTRICTION ON THE RE-SALE OF CHATTELS. — Contracts enabling a patentee to control the price in re-sales of articles manufactured under his patent violate neither the common-law prohibition

since the Act of 10 & 11 WM. III, *supra*, expressly provided that in such a case the child should be treated as born.

¹³ Cited in *Hale v. Hale*, Finch's Precedents in Chancery 50. See also *Robinson v. Litton*, 3 Atk. 209, 211.

¹⁴ As, for example, the restraining of a tenant without impeachment of waste from making an unreasonable use of the property. The cases are collected in 1 AMES, CASES ON EQUIT, 469.

¹⁵ 3 INST. 50; *Rex v. Senior*, 1 Moody C. C. 346; *Queen v. West*, 2 C. & K. 784, 44 Sol. J. 52.

¹⁶ *Rex v. Poulton*, 5 C. & P. 329; *Rex v. Enoch*, 5 C. & P. 539. See 1 RUSSELL, CRIMES, 7 ed., 663.

¹⁷ It might be urged that in estimating ordinary damages the plaintiff's present condition is compared not exclusively with his prior condition, but with that in which he would now be except for the defendant's act. But this is merely a convenient way of comparing his prior condition and its possibilities of improvement with his present condition. Nor has any such principle ever been the basis of a substantive cause of action.

¹⁸ *Walker v. Great Northern Ry. Co. of Ireland*, L. R. 28 Ir. 69; *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14; *Allaire v. St. Luke's Hospital*, 184 Ill. 359, 56 N. E. 638; *Gorman v. Budlong*, 23 R. I. 169, 49 Atl. 704. But see *Villar v. Gilbey*, [1907] A. C. 139, 144. The text-writers are *contra*. See 1 BEVEN, NEGLIGENCE, 3 ed., 73-76; SALMOND, TORTS, 2 ed., 349, 350. Very likely the courts have been influenced by a fear of trumped-up damage suits. *Walker v. Great Northern Ry. Co. of Ireland*, L. R. 28 Ir. 69, 81, 82. The considerations which have led to a denial of recovery in many jurisdictions for injuries negligently inflicted without physical contact are multiplied in this case. *Spade v. Lynn & Boston R. Co.*, 168 Mass. 285, 47 N. E. 88. *Contra*, *Dulieu v. White*, [1901] 2 K. B. 669.

against restraint of trade¹ nor the Sherman Anti-Trust Act.² This follows from the exclusive right to use, make, and sell expressly granted to the patentee by the patent statute³ in consideration of a complete publication after the period of exclusive use. To the extent that he restricts the grant of any of these rights he retains the right to forbid others to make complete use of the article, and whosoever violates, with notice, the restrictions imposed by the patentee is an infringer.⁴ That this is the true reason for the exemption from the rule against restraint of trade is apparent from the fact that the exemption has never been extended to contracts respecting patented articles which have once passed beyond the domain of the patent by an original sale without restriction.⁵ Furthermore, although a contract restricting the use or sub-sale of a chattel is not allowed at common law so to attach to a chattel as to obligate a purchaser by operation of notice,⁶ thus operating as a restraint on alienation, yet this rule has been held not to apply to chattels protected by a patent, because the statute in effect permits that very thing to be done.⁷

Despite the close similarity between patents and copyrights, there is such a wide difference in the spirit and wording of the patent and copyright⁸ statutes that the law on this matter might have been quite different with regard to copyrighted articles.⁹ The weight of authority, however, is to the effect that a contract in regard to such an article is not in restraint of trade,¹⁰ at least where it is directly between a publisher and a single vendee with reference to a sub-sale price.¹¹ It would seem, however, that the owner of a copyright does not have the right to hold a purchaser merely because the latter has notice of an existing obligation.¹²

In the case of ordinary chattels, since a restrictive agreement cannot attach to the chattel itself, the only question is whether an action on the contract is barred because the contract is in restraint of trade.¹³ Not

¹ *Victor Talking Machine Co. v. The Fair*, 123 Fed. 424; *National Phonograph Co. v. Schlegel*, 128 Fed. 733.

² U. S. COMP. STAT., 1901, p. 3200; *Bement v. National Harrow Co.*, 186 U. S. 70.

³ U. S. COMP. STAT., 1901, § 4884.

⁴ Where the imposition of conditions constitutes a contract between the patentee and his direct licensee, the patentee may, of course, have a double remedy, — an action in tort for infringement, or an action in contract. *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, 77 Fed. 288; *Victor Talking Machine Co. v. The Fair*, *supra*.

⁵ See *Park & Sons Co. v. Hartman*, 153 Fed. 24, 32.

⁶ *Prates v. Campbell*, 110 Ky. 23, 60 S. W. 918. See *Garst v. Hall & Lyon Co.*, 179 Mass. 588, 691, 61 N. E. 219. For the principle underlying this rule, see *Co. Litt.*, § 360.

⁷ *The Fair v. Dover Mfg. Co.*, 166 Fed. 117; *New Jersey Patent Co. v. Schaeffer*, 44 Fed. 437. See 6 ILL. L. REV. 357.

⁸ U. S. REV. STAT., §§ 4952, 4965, 4970.

⁹ See *Bobbs-Merrill Co. v. Straus*, 147 Fed. 15, 23.

¹⁰ See *Straus v. American Publishers' Association*, 177 N. Y. 473, 477, 69 N. E. 107, 108; *Murphy v. Christian Press Association*, 38 N. Y. App. Div. 426, 56 N. Y. Supp. 597. But see *Park & Sons Co. v. Hartman*, 153 Fed. 24, 31.

¹¹ *Murphy v. Christian Press Association*, *supra*.

¹² *Cf. Bobbs-Merrill Co. v. Straus*, 210 U. S. 339. In that case there was no contract, but there was a notice attached to the article that it was not to be sold below a certain price.

¹³ Chattels in whose production secret processes or other trade secrets have been

to be in restraint of trade, a restriction must not be so wide as to affect the public injuriously, and no wider than is necessary for the protection of the prior owner.¹⁴ The former requisite is unsatisfied if the restraint is total,¹⁵ and even a partial restraint must be merely ancillary to a principal contract.¹⁶ Whether a restraint is wider than is necessary to constitute a fair protection to the promisee must always be a question on the particular facts of each case.¹⁷ A single contract determining the re-sale price of chattels and not dealing with all such chattels in commerce is upheld.¹⁸ On the other hand, a system of contracts controlling the price of sales and re-sales has generally been held invalid.¹⁹ For any benefit to the original vendor is manifestly but an incident to the chief result, the benefit to his vendees and sub-vendees by the elimination of competition between them.²⁰ A recent California case takes a contrary view. *Ghirardelli Co. v. Hunsicker*, 128 Pac. 1041 (Cal.). The decision is curious in that the court, after finding that the contract was ancillary and that the provision resulted only in a partial restraint of the whole output of the commodity, reached its conclusion without any consideration of the question whether the plaintiff was being afforded more protection than he fairly required.

ADMISSIBILITY OF LEARNED TREATISES AS EVIDENCE.—A recent case discusses but declines to follow Professor Wigmore's suggestion¹ that medical books and other learned treatises be admitted as evidence of the opinions which they contain. *Denver City Tramway Co. v. Gawley*, 129 Pac. 258 (Colo., Ct. App.). In admitting the writings of an expert

utilized are subject to the same rules as ordinary chattels. *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373; *Grogan v. Chaffee*, 156 Cal. 611, 105 Pac. 745. *Contra*, *Wells & Richardson Co. v. Abraham*, 146 Fed. 190. Such an owner is allowed to protect himself against betrayal of his secret by one who has received it through confidential relations. *Chadwick v. Covill*, 156 Mass. 190, 23 N. E. 1068; *Jarvis v. Knapp*, 12 Fed. 34; *Harrison v. Glucose Co.*, 116 Fed. 304. So also he is protected against breach of contract when the secret is communicated in confidence and under restrictions as to its use.

¹⁴ *Horner v. Graves*, 7 Bing. 735. See *Gibbs v. Baltimore Gas Co.*, 130 U. S. 396, 409.

¹⁵ *Cf. Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211; *Swift & Co. v. United States*, 196 U. S. 395. This is true even though the public might not have much general interest in the restraint. *Montague & Co. v. Lowry*, 193 U. S. 38.

¹⁶ *Hodge v. Sloan*, 107 N. Y. 244, 17 N. E. 355; *Navigation Co. v. Winsor*, 20 Wall. (U. S.) 64.

¹⁷ *Horner v. Graves*, *supra*. See *Nordenfeldt v. Maxim Nordenfeldt Co.*, [1894] A. C. 535, 567.

¹⁸ *Elliman v. Covington*, 2 Ch. D. 275; *Garst v. Harris*, 177 Mass. 72.

¹⁹ *Dr. Miles Medical Co. v. Park & Sons Co.*, *supra*; *Park & Sons Co. v. Hartman*, *supra*. See 24 HARV. L. REV. 268. *Contra*, *Walsh v. Dwight*, 58 N. Y. 91; *Park & Sons Co. v. National Wholesale Druggists*, 175 N. Y. 1, 67 N. Y. S. 136. See 24 HARV. L. REV. 244.

²⁰ See *Park & Sons Co. v. Hartman*, 153 Fed. 24, 45. The cases are sometimes supported on the ground that the effect of the agreement is not different from that of a contract between competing dealers fixing prices. Such contracts are universally held invalid. *People v. Sheldon*, 139 N. Y. 251; *Craft v. McConoughy*, 79 Ill. 346.

¹ 26 AM. L. REV. 390; WIGMORE, EVIDENCE, §§ 1690 *et seq.*